Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

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INDU CRAFT, INC.,

Petitioner,

v.

BANK OF BARODA and
KRISHNAKANT C. CHOKSHI,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Re-examination clause of the Seventh Amendment of the U.S. Constitution prohibit a federal appeals court from spontaneously reducing a jury's damage award -- which the appeals court found to be supported by evidence -- by a "setoff"?

2. Should a federal court exercising diversity jurisdiction award postjudgment interest under the federal interest statute, 28 U.S.C. §1961, or, consistent with the Erie doctrine, under state law?

3. Should post-judgment interest under 28 U.S.C.§ 1961 commence from the date of (a) the first judgment which was set aside by the trial court itself, which setting aside was reversed by the U.S. Court of Appeals some three years later, and the first judgment substantially modified, or (b) the final judgment mandated by the U.S. Court of Appeals?

4. Whether pre-judgment interest may be compounded under New York law where the defendants acted in bad faith, or whether the failure to raise that issue before the trial court precludes the awarding of such compound interest?

5. Whether the trial court's failure to instruct the jury on punitive damages for prima facie tort, where such damages were properly available under state law, was an error warranting reversal and a retrial on the issue?

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INDUCRAFT, INC.,

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v.

BANK OF BARODA and KRISHNAKANT C. CHOKSHI,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgments and orders of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 3, 1995, October 4, 1995 and July 9 and 12, 1996.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties. There are no parent companies. There are no nonwholly- owned subsidiaries.

OPINIONS AND ORDERS BELOW

The first opinion of the United States Court of Appeals for the Second Circuit appears at 47 F.3d 490, A-1a.[1] The subsequent District Court opinion appears at 1995 WL 479516, A-80a, and the unreported judgment thereon appears at A-90a. An October 4, 1995 unreported order of the Second Circuit appears at A-18a. The second opinion of the Court of Appeals, decided June 13, 1996, is unreported and appears at A-20a. As amended by the Court on July 9, 1996, it appears at 87 F.3d 614, A-43a. An unreported order denying a Petition for Rehearing was entered on July 12, 1996, A- 102a.

JURISDICTION

Judgments and orders of the Court of Appeals were entered on February 3, 1995 (A-1a), October 4, 1995 (A-18a) and July 9, 1996 (A-34a). A timely application for rehearing was denied by an order entered July 12, 1996 (A-102a).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[1] "A" refers to the Appendix filed herewith.

STATUTES AND RULE INVOLVED

28 U.S.C. § 1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

Rule 37 of the Federal Rules of Appellate Procedure. Interest on Judgments

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

New York Civil Practice Law and Rules:

Section 5001. Interest to verdict, report or decision

(a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

(b) Date from which computed. Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.

***

Section 5002. Interest from verdict, report or decision to judgment

Interest shall be recovered upon the total sum awarded, including interest to verdict, report or decision, in any action, from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment. The amount of interest shall be computed by the clerk of the court and included in the judgment.

Section 5003. Interest upon judgment

Every money judgment shall bear interest from the date of its entry. Every order directing the payment of money which has been docketed as a judgment shall bear interest from the date of such docketing.

Section 5004. Rate of Interest

Interest shall be at the rate of nine per centum per annum, except where otherwise provided by statute.

STATEMENT OF THE CASE

Indu Craft, Inc. ("Indu Craft"), a New York corporation then wholly owned by its President, Hemant Mehta, was an importer and wholesaler of sportswear throughout the United States. In 1983, it obtained a $500,000 line of credit from the respondent Bank, which was wholly owned by the Government of India. In December 1986, the Bank increased this facility to $2.7 million (including an overdraft facility of $1.2 million). Indu Craft issued a promissory note ("Note") as collateral.

The Bank often allowed Indu Craft to exceed its overdraft limit by as much as 40 percent, and typically granted letters of credit within 24 hours of application. Thereby, Indu Craft's merchandise was manufactured and shipped quickly to the U.S.

In November 1986, respondent Chokshi -- the Bank's then- Manager in New York -- requested Mehta to invest in a business (ICCS) for the benefit of Chokshi's son. After evaluating the proposal, Mehta rejected it in February 1987.

In short order, the Bank reduced Indu Craft's credit facilities significantly. Chokshi falsely informed Indu Craft that the reduction was directed by the Bank's central office in India; in fact the central office was unaware of the reduction. Further letters of credit were substantially delayed, if issued at all. The Bank then demanded that Indu Craft's applications for letters of credit be backed 100% by confirmed customer orders. The Bank knew that commercial practices in the garment industry made such requirement commercially impossible to comply with. Moreover The Bank did not issue any letters of credit to Indu Craft after May 4, 1987. The Bank repeatedly assured Indu Craft that its credit facilities would be restored, but never did so. Meanwhile, due to the Bank's delays and refusal to issue new letters of credit, Indu Craft's suppliers stopped producing goods and delayed shipments. Garments arrived late and had to be sold at substantial discounts. As a result, Indu Craft ceased operations in November, 1987 and brought this action in the U.S. District Court for Southern District of New York invoking diversity jurisdiction, 28 U.S.C. §1332.

Indu Craft asserted claims for breach of the implied covenant of good faith and fair dealings in loan agreements, and for prima facie tort. The Bank counterclaimed, based on the Note. Trial was by jury. Indu Craft sought a jury instruction for punitive damages on the prima facie tort claim, but the trial court did not give any such instruction.

The jury found, A-104a, that the Bank reduced or effectively canceled Indu Craft's line of credit in bad faith and in an unfair manner to avenge Mehta's refusal to invest for the benefit of Chokshi's son. Further, it found that Indu Craft was substantially in compliance with the loan agreement. Accordingly, the jury found for Indu Craft on the first claim for breach of the implied covenant of good faith and fair dealing, and quantified damages at $3 million. But it reduced this sum by $1 million for failure to mitigate, and thereby brought in a net verdict for $2 million on this claim. A-105a-106a.

On the prima facie tort claim, the jury found that the Bank's and Chokshi's reduction/cancellation of Indu Craft's line of credit and refusal to open or amend letters of credit were vengeful, malicious and done solely to injure Indu Craft. Accordingly, it returned a verdict on this claim against the Bank and Chokshi, and awarded Indu Craft special damages of $1.25 million, A-111a.

On the Bank's counterclaim on the Note, the jury found that the Bank or Chokshi had wrongfully interfered with and prevented Indu Craft from fully repaying the Bank. Hence, verdict was for Indu Craft on this counterclaim, A-112a.

Judgment was entered accordingly on August 21, 1992, with pre-judgment interest being awarded at the New York rate (9%) to the day of entry. A-95a.

On December 17, 1993, the trial court granted the defendants' motion for setting aside the jury verdict and entering judgment for the Bank as a matter of law. The Court

held that Indu Craft had not proven damages, and dismissed the complaint. It also affirmed the jury verdict on the Bank's counterclaim, A-48a, and entered an amended judgment, A-78a.

Both sides appealed. On February 3, 1995, the Second Circuit reversed the trial Court, finding that the jury verdict was supported by the evidence. It reinstated the judgment favoring Indu Craft, but ordered that the amount due on the Note be offset therefrom, A-1a. On remand, the trial Court reduced the jury verdict by the principal amount of the Note and denied the Bank's application for interest and attorney's fees, A-80a. It awarded pre-judgment interest to August 21, 1992 (at 9%, the New York rate) to Indu Craft on the net balance of the jury award after the set off, entering a judgment in the amount of $2,268,865.43 on August 17, 1995, A-80a, 90a.

Indu Craft moved the Second Circuit to recall the mandate. On October 4, 1995, that Court directed the District Court to "award post-judgment interest at the applicable federal rate from August 21, 1992, the date of the original judgment in the trial court." A-18a. On October 19, 1995, an amended judgment in the amount of $2,519,822.29 was entered to include post-judgment interest from August 21, 1992 at the federal rate of 3.41 percent, A-97a.

Both sides appealed. But the Second Circuit affirmed the judgment, A-34a.

ARGUMENT

I. **By Reducing the Jury's Award Based on The Note (Upon Which The Jury Found No Liability), The Court Below Extended Its Reexamination Powers Under The Seventh Amendment In A Novel And Unprecedented Manner Which Should Be Reviewed By This Court.**

> An essential characteristic of [the federal judicial] system is the manner in which, in civil common law actions, it distributes trial functions between judge and jury and, under the influence -- if not the command [footnote omitted] -- of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.

Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525, 537 (1958). While an appellate court's authority to review jury verdicts under the Re-examination Clause of the Seventh Amendment is "large," Gaspirini v. Center For Humanities, Inc., ___ U.S. ___, ___, 116 S.Ct. 2211, 2222 (1996), it does not extend to substituting the court's own view of the facts for that of the jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge"). Accordingly, our courts have uniformly sustained jury verdicts *absent* a "total failure of evidence," Parts & Elec. Motors, Inc. v. Sterling Electric, Inc., 826 F.2d 712, 720 (7th Cir. 1987); accord, United States v. Merritt Meridian Const. Corp., 1996 WL 501755 (2nd Cir. 1996); Electro Source, Inc. v. United Parcel Service, Inc., 1996 Wl 506915 (9th Cir. 1996); Tidwell v. Meyer's Bakeries, Inc., 93 F.3d 490 (8th Cir. 1996).

Here, the Second Circuit departed from this established law and practice in three major respects, thereby setting a precedent with potential for tremendous systemic damage. First, that Court held that the "evidence of the lost value of Indu Craft as a going enterprise, standing alone, would have been sufficient to support the jury's award of damages." A-14a. *Upon this holding, the Seventh Amendment mandated that the Court simply affirm the jury award.* Even if the Court could speculate on the jury's erroneous reasoning for the award, it could not reassess damages.[2] As this Court has held, "[J]uries are not bound by what seems inescapable logic to judges." Morissette v. United States, 342 U.S. 246, 276 (1952). Indeed, *as recently as **Gaspirini**, 116 S.Ct. 2211, this Court held that a federal appeals court could not, consistent with the Seventh Amendment, reduce a jury award in order to comply with State substantive law; that was the function of the trial court.*

The proper measure of damages is indisputably an issue of fact, St. Louis, I.M. & S.R. Co. v. Craft, 237 U.S. 648, 661 (1915). Indeed, the very existence of a damages remedy may be determinative of the *right* to a jury trial, Tull v. United States, 481 U.S. 412 (1987). By reassessing the damage award, the Second Circuit effectively recast the jury's factual findings. This was an unprecedented extension of its

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[2] That apart, the Second Circuit was substantively wrong: It recognized that the evidence which sustained the verdict *"already incorporates the necessary deduction of fixed and variable costs,* providing an accurate measurement of plaintiff's loss as adjusted for savings resulting from the breach." A-12a (emphasis added). Obviously, "fixed and variable costs" included the note at issue. Thus, the Court's ruling was based upon an impermissible double-counting and permitted a windfall to the Bank, contrary to the jury's verdict.

Reexamination powers, contrary to precedents going back to well over a century. See, e.g., Railroad Co. v. Fraloff, 100 U.S. 24, 31-32 (1879).

Second, the jury explicitly held that Indu Craft was *not* liable on the Note and denied any recovery on the Bank's counterclaim. A-7a. The Second Circuit did not fault this finding as unsustainable. Nevertheless, *that Court modified the jury's finding* -- nay, reversed it -- by ordering an "equitable setoff" based on the Note: If Indu Craft was not liable on the Note, as the jury held, the Note could not sustain any setoff. This was also a novel expansion of the Court's authority under the Re-examination Clause.

The Second Circuit's effective reversal of the jury's finding of no liability is also clearly contrary to well-settled precedent. *Indeed, even where a jury has found liability, this Court has held that the Seventh Amendment prohibited federal courts from increasing the damages*. As this Court explained over six decades ago,

> To hold [otherwise] is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept 'an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess.'

Dimick v. Schiedt, 293 U.S. 474, 487 (1935). Dimick has been repeatedly approved. See, e.g., Gaspirini, 116 S.Ct. at 2222; Markman v. Westview Instruments, Inc., 116 S.Ct. 1384, 1390 (1996); Honda Motor Co. Ltd. v. Oberg, 512 U.S. 415, ___, 114 S.Ct. 2331, 2336 n.3 (1994). Surely, if an appeal court cannot *increase damages* by way of additur, it cannot *find liability* where none existed.

Third, Indu Craft was entitled[3] to have the jury decide the issue of punitive damages for prima facie tort. Curtis v. Loether, 415 U.S. 189 (1974) (punitive damages is issue for the jury); Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 278-79 (1989) ("In a diversity action, . . . the propriety of an award of punitive damages for the conduct in question, and the factors *the jury* may consider in determining their amount, are questions of state law," emphasis added). Indeed, the propriety of such instruction is amply borne out by the jury's finding of malice and liability on prima facie tort.

The trial court failed to instruct the jury as Indu Craft requested, and the Second Circuit did not address the issue. Cfr., Johnson v. Hugo's Skateway, 974 F.2d 1408, 1416 (4th Cir. 1992) (district court's failure to instruct jury on punitive damages warranted reversal); Benigni v. City of Hemet, 879 F.2d 473, 479 (9th Cir. 1988), reh'g denied, 882 F.2d 356 (9th Cir. 1989) ("A failure to submit a proper jury instruction is a question of law reviewable de novo . . ."). Thereby, Indu Craft was deprived of its Seventh Amendment right to have a jury determination of this issue.

Thus, the Court below departed from the usual course of judicial proceedings. By invading the province of the jury

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[3] New York law on the issue is clear and well-settled:

> the award of punitive damages . . . rests is the discretion of the jury. . . The basis for an award of exemplary damages depends upon a showing that the wrong is aggravated by evil or a wrongful motive or that there was willful and intentional misdoing, or reckless indifference equivalent thereto. . .

Mistral, Inc. v. Columbia Broadcasting System, 61 A.D.2d 491 (1st Dep't 1978).

while holding that the findings were fully supported by evidence, the Court took an unprecedented and novel view of its powers under the Seventh Amendment, and hence, certiorari is appropriate. Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., 454 U.S. 464, 470 (1982) ("Because of the unusually broad and novel view of standing to litigate a substantive question in the federal courts adopted by the Court of Appeals, we granted certiorari, . . ."); Pointer v. Texas, 380 U.S. 400, 401 (1965) (writ granted to consider the novel and important question of whether the Confrontation Clause of the Sixth Amendment is applicable to the states); United States v. Gouveia, 467 U.S. 180 (1984) ("novel application of our Sixth Amendment precedents").[4]

II. By Awarding Post-Judgment Interest In This Diversity Case Under Federal Law Instead of State Law, The Lower Court Decided An Important Federal Question That Has Not Been But Should Be Settled By This Court

A. The *Erie* Doctrine Requires That In Diversity Cases, Post-Judgment Interest Be Determined According To State Law

Under the Erie doctrine, diversity courts apply state substantive law and federal procedural law. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78, 79 (1938); accord, Byrd, 357 U.S. 933; Salve Regina College v. Russell, 499 U.S. 225 (1991). For determining whether a provision at issue is

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[4] he Second Circuit ordered this "equitable setoff" suo moto. Hense, the question of Indu-Craft's raising it before the lower court does not arise.

substantive or procedural, the "outcome-determination" test is applied. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945). While applying this test, courts must be guided by Erie's twin purposes: "discouragement of forum-shopping and avoidance of inequitable administration of the law." Hanna v. Plumer, 380 U.S. 460, 468 (1965). As this Court reiterated recently,

> Just as the Erie principle precludes a federal court from giving a state-created claim "longer life . . . than [the claim] would have had in the state court," Ragan [v. Merchants Transfer & Warehouse Co.], 337 U.S [530] at 533 [1949], so Erie *precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court.*

Gaspirini, 116 S.Ct. at 2221 (emphasis added). It follows that Erie also precludes a recovery that is significantly *less* than that in state court.

In Gaspirini, this Court considered the standard to be applied by federal courts sitting in diversity jurisdiction to review jury awards. State law directed state appeals courts to apply a "deviates materially" standard, as opposed to the traditional "shocks the conscience" standard applied in federal courts.

This Court reasoned that while the State law "contained a procedural instruction, . . . the State's objective is manifestly substantive." Id., at 2220. Should the federal courts ignore State law, "'substantial' variations between state and federal money judgments]' may be expected" implicating the "twin aims" of Erie. Id., at 2221. Hence, the diversity

court should respect the State's "dominant interest,"id. at 2224, and "must be guided by the damage-control standard" provided by State law, id., at 2225.

Thus, the lower courts should have respected New York's "Dominant Interest" in prescribing post-judgment interest. Judgment interest has always been considered an item of substantive damages, and hence, determined by State law in diversity cases. See, e.g., Budge v. Post, 643 F.2d 372, 375 (5th Cir. 1981); Jarvis v. Johnson, 668 F.2d 740, 746-47 (3d Cir.1982); Bauer v. Uniroyal Tire Co., 630 F.2d 1287, 1290 (8th Cir.1980); Casto v. Arkansas-Louisiana Gas Co., 562 F.2d 622, 625 (10th Cir.1977); Restatement (Second) of Conflict of Laws §171 comment C (1971). "[T]he purpose of post-judgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant." Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 835 (1989) (citation omitted).

New York law provides for post-judgment interest at 9%, CPLR 5003, 5004, which is significantly higher than the variable federal rate. Clearly, under the circumstances, "substantial variations" in the recovery pursuant to federal and state money judgments are much more than expected; they are inevitable.

B. Refusal to Apply State Law Will Lead To Forum Shopping And To Inequitable Administration of Justice

This Court has zealously applied state law in furtherance of the twin aims of Erie. See, e.g., Walker v. Armco Steel Corp., 446 U.S. 740 at 753 (1980) (whether

filing of a complaint or service tolls the statute of limitation); Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 202-04 (1956) (enforceability of arbitration provision in contract); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 at 555-556 (1949) (requirement of indemnity bond for litigation expenses in derivative actions); Sun Oil Co. v. Wortman, 108 S.Ct. 2117 (1988) (adoption of Kansas's statute of limitation); Zicherman v. Korean Air Lines Co., 116 S.Ct 629, 634 (1996) ("It does not seem to us that the question of who is entitled to a damages award is procedural").

Clearly, the rate of post-judgment interest in cases governed by substantive State law should be the same in state and federal courts. Rejection of State law on interest in diversity cases would lead to forum-shopping and inequitable administration of justice. Since the federal rate has been lower than the New York rate for several years now (since mid-1989), non-resident defendants are encouraged to shop for more favorable law by removing to federal court. This factor, by itself, suffices to warrant application of state law. Walker, 446 U.S. at 753 (failure to meet one part of the twin-aims test suffices to warrant application of state law).

This reasoning has been followed uniformly. For example, in S.A. Healy Company, v. Milwaukee Metropolitan Sewerage District, 60 F.3d 305 (7th Cir. 1995) -- cited approvingly in Gaspirini, 116 S.Ct at 2220 n.7 -- the Seventh Circuit applied Wisconsin's rule of double taxing costs and awarding interest at 12% *until satisfaction of judgment* where plaintiffs' offer of settlement were rejected. Otherwise, Judge Posner reasoned, defendants would have a "strong incentive to forum-shop and remove these cases to federal courts." See also Mangold v. California Public Utilities Commission, 67

F.3d 1470 (9th Cir. 1995) (Since the availability of a multiplier for attorneys' fees in state court and not in federal court would lead to forum shopping and inequitable administration, State law applied even where diversity jurisdiction not involved); Trierweiler v. Croxton and Trench Holding Corporation, 90 F.3d 1523, 1538 (10th Cir. 1996) (Colorado rule requiring Certificate of Review before filing actions against professionals applied in diversity case to prevent forum-shopping and inequity).

C. Serious Questions Over The Interpretation Of The Amended Federal Post-Judgment Interest Statute Should Be Settled By This Court

Congress may legislate in traditional state-regulated areas, but courts have always assumed that "Congress does not exercise [this power] lightly." Gregory v. Ashcroft, 501 U.S. 452 (1991). Further,

> To the extent that federal statutes are ambiguous, we do not read them to displace state law. Rather, *we must be "absolutely certain" that Congress intended such displacement* . . .

Allied-Bruce Terminix Companies, Inc. v. Dobson, 115 S.Ct. 834, 848 (1995) (emphasis added). Moreover, Congress is assumed to know of judicial interpretation of a statute and "to adopt that interpretation when it reenacts a statute without change." Lindahl v. Office of Personnel Management, 105 S. Ct. 1620, 1628 n.15 (1985).

Under these principles, Section 1961 cannot govern the post-judgment interest rate in diversity cases. Prior to its amendment in 1982, federal courts uniformly applied state law for determining post-judgment interest. See, e.g., Home Life

Ins. Co. v. Equitable Equipment Co., Inc., 694 F.2d 402, 404 (5th Cir.1982); Affiliated Capital Corp. v. City of Houston, 793 F.2d 706, 709 nn. 3 & 5 (5th Cir. 1986) (en banc); Davis & Cox v. Summa Corp., 751 F.2d 1507, 1522 (9th Cir. 1985). Congress is assumed to have been aware of this interpretation.

Nevertheless, while amending the statute, Congress said nothing about diversity cases. The "new statute maintains the same language as the prior statute except for providing a federal rate of interest, and neither the statute nor the legislative history mention diversity actions despite the long line of cases holding that judgment interest is a matter of substantive law . . ." Weitz Co., Inc. v. Mo-Kan Carpet, Inc., 723 F.2d 1382, 1387 (8th Cir. 1983) (per Swygert J. (dissenting)); accord, Lazzara v. Esser, 622 F. Supp. 48 (N.D. Ill. 1985); Freedline v. Luxemburg, 682 F. Supp. 311 (M.D. Louisiana 1988).[5]

Hence, the pre-existing interpretation of 1961 should continue to be good law. However, some courts have disagreed and applied 1961 to diversity cases also. Weitz, 723 F.2d 1382; G.M. Brod & Co., Inc. v. U.S. Home Corp., 659 F.2d 1526 (11th Cir. 1985); Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 848 F.2d 613, 623-24 (5th Cir. 1988).

Reading Section 1961 narrowly, i.e., to apply only to non-diversity cases, would also avoid a major constitutional question. This is consistent with well-settled law. Lucas v. Alexander, 279 U.S. 573, 577 (1929) (a law "must be

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[5] In Kaiser, 494 U.S. 827, this Court interpreted Section 1961 in the context of a non-diversity case. Obviously, no Erie question was involved.

construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity"); accord, Miller v. Johnson, 115 S.Ct. 2475, 2493 (1995); Gutierrez de Martinez v. Lamagno, 115 S.Ct. 2227, 2237 (1995).

Thus, for example, in Bernhardt, 350 U.S. at 201-2, this Court narrowly construed the Arbitration Act to apply only to transactions involving commerce and maritime activities. It explained:

> If respondent's contention is correct, a constitutional question might be presented. *Erie R. Co. v. Tompkins* indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases.... Our view ... is that § 3 so read, would invade the local law field. We therefore read § 3 narrowly to avoid the issue.

350 U.S. at 202. See also Walker, 446 U.S. at 748-53 (narrowly construing Fed.R.Civ.P. 3 and avoiding constitutional question).

Thus, Section 1961 ought to be read so as to apply only to non-diversity cases. As the Fifth Circuit observed in Affiliated Capital, 793 F.2d at 709 n. 5,

> *** In *Massachusetts Benefit Assn. v. Miles*, 137 U.S. 689, 691 (1890) the Supreme Court held that the federal interest statute, "while providing only for interest upon judgments, does not exclude the idea of a power in the several States to allow interest upon verdicts, and, where such allowance is expressly made by State statutes, we consider it a right given to a successful plaintiff... The courts of the State and the Federal Courts sitting within the State should be

> in harmony upon this point." After *Erie,* 304 U.S. 64 (1938), the Supreme Court quoted *Miles* with approval and stressed that the allowance of interest on verdicts should be the same in state and federal courts in diversity cases. *See Klaxon,* 313 U.S. at 497.

Such a construction would avoid the major constitutional question of Congress's underlying power to legislate. This important issue of federal law should be decided by this Court.[6] One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965) (important question of whether the constitutional exclusionary rule applies to certain types of forfeiture proceedings); Bruen v. Pfeifer Transportation Co., 361 U.S. 129, 130 (1959) (decision below "seemed to be out of line with the authorities"); Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728, 733 (1982) (decision "appeared to be in conflict with our precedents").

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[6] While this issue was not squarely addressed before the lower court, the significance and the frequency of its invocation calls for a pronouncement from this Court. Indeed, this Court has, on similar appropriate occasions, decided cases even on an *unargued* theory. Arcadia v. Ohio Power Co., 498 U.S. 73, 77 (1990); Erie, 304 U.S. at 77-78 (overruling Swift v. Tyson, 16 Pet. 1 (1842) as unconstitutional); see also Erie, 304 U.S. at 82 (Butler, J.) (pointing out that no constitutional question was argued or briefed either in t his Court or the court below). Moreover, the issue is purely legal, which "mitigates the force of the considerations underlying the policy of refusing to consider issues not raised below." Trierweiler, 90 F.3d at 1538.

III. The Second Circuit's Decision That Post-Judgment Interest Begin from the Date of a Judgment Which Had Been Vacated by Both the District Court and Itself Is In Conflict with Decisions of the 5th, 9th, and District of Columbia Circuits and with Relevant Decisions of this Court

A. The decision below conflicts with those of the Fifth, Ninth and District of Columbia Circuits.

The decision below is in conflict with two different lines of decisions: that taken by the 5th and 9th Circuits, and that taken by the District of Columbia Circuit. Thus, in Turner v. Japan Lines, Ltd., 702 F.2d 752, 757 n. 7 (9th Cir., 1983) (emphasis added), the Ninth Circuit observed:

> Of course, in those cases where an earlier judgment in favor of plaintiff is vacated on appeal and a new verdict or decision for plaintiff is rendered in a District Court on remand, *interest under §1961 should properly run only from the date of entry of the new judgment and not from that of the old judgment, since the new verdict or decision presumably will include the value of loss of use of the money judgment from the date of loss up to the date of the new verdict on remand.*

This is based on the sound reason that a decision vacated by an appellate court has no legal effect and cannot spawn any legal consequences. Flores by Galvez-Maldonado v. Meese, 934 F.2d 991, 997 (9th Cir. 1990).

Similarly, the Fifth Circuit ruled in Falcon v. General Telephone Co., 815 F.2d 317, 320 (5th Cir. 1987) that a vacating of judgment, even when the original finding of fact is

not disturbed, has the effect of taking away "from any precedential effect."[7]

A different approach has been taken by the District of Columbia Circuit, narrowly confining the term "judgment" in § 1961 to a final judgment under Rule 54(b), Fed. R. Civ. P. In Hooks v. Washington Sheraton Corp., 642 F.2d 614, 616 (D.C. Cir., 1980), that Court permitted interest to run only from the date of a final judgment under Rule 54 (b), even though a judgment had actually been entered under Rule 58 over 14 months earlier. The Ninth Circuit has sided with the dissenting opinion in Hooks, Turner, 702 F.2d at 757 n.6.

These decisions purport to follow Kaiser, where this Court held that interest should not be calculated from the date of a legally insufficient judgment, 494 U.S. at 834. There, this Court also noted that since the original judgment on damages was unsupported by evidence, damages had not been ascertained in any meaningful way, id. at 836.

The Second Circuit attempted to distinguish Kaiser from this case on the ground that the factual findings of the jury here had not been disturbed on appeal. *But the jury's factual findings here were disturbed on appeal* -- as seen

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[7] The Fifth Circuit had earlier ruled that interest should attach from the date of the first judgment unless the appellate court mandate alters the judgment in more than relatively minor respects, Reaves v. Ole Man River Towing, Inc., 761 F.2d 1111, 1113 (5th Cir., 1985), in partial reliance upon a Tenth Circuit decision [Ashland Oil, Inc. v. Phillips Petroleum Co., 607 F.2d 335 (10th Cir., 1979)] holding that in view of the extent to which the case was reversed, the appropriate date was that the judgment of the district court entered upon remand. Reaves has been followed by the Seventh Circuit in Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1211 (7th Cir., 1989).

above, the jury verdict of no liability on the Note was undermined and effectively nullified. The Second Circuit allowed the Note as an equitable offset, reducing the judgment (without interest) from $3.5 million to $1.8 million. Thus, the original damages were not ascertained in any meaningful way by the judgment used as the date for the running of post-judgment interest -- indeed, the damages were cut down by half. Whether or not there was evidentiary support for the findings, the damages awarded were significantly lower than under the first judgment. Hence, "it would be counterintuitive, to say the least, to believe that Congress intended post-judgment interest to be calculated from such a judgment," Kaiser, 494 U.S. at 836.

No doubt can exist that had the Second Circuit ordered a new trial, the 1992 judgment would not have been deemed meaningful. The fact that a new trial was avoided by unilaterally allowing the Bank's counterclaim as a set-off simply had nothing to do with the "meaningfulness" of the 1992 judgment. Half of that judgment -- the disallowance of the Bank's counterclaim – was now rendered ineffectual, with interest to run not on the original jury award, but only on the difference between the amount to plaintiff awarded by the jury and the Bank's set off awarded by the Second Circuit. Since the judgment of the Court of Appeals was significantly different in amount, and in theory, from the 1992 judgment, such earlier judgment was no longer meaningful.

In any event, the decision below clearly conflicts with the decisions of the 5th, 9th and District of Columbia Circuits and has decided an important federal question in a way that conflicts with the relevant decisions of this court in United States v. Munsingwear, 340 U.S. 36, 41 (1950) and Kaiser.

B. **The decision below conflicts with the most recent decisions of the Circuits Which Held that the test is the degree to which the judgment was upheld or invalidated on appeal.**

Kaiser opened up a battle in each case as to what is a "meaningful" decision. Thus, in Dunn v. Hovin, 13 F.3d 58 (3d Cir., 1993), the Third Circuit distinguished Kaiser on the ground that there had been a remittitur merely reducing the award; part of the original damage award was affirmed. In Kaiser the entire damage verdict had been overturned.

Three other circuits have held when post-judgment interest should run turns on the degree to which the judgment was upheld or invalidated on appeal. Lougham v. Consol-Pennsylvania Coal Co., 6 F.3d 88, 96 (3d Cir. 1993); H. J., Inc. v. Flyght Corp., 925 F.2d 257, 261-2 (8th Cir. 1991); Cordero v. De Jesus-Mendez, 922 F.2d 11, 17 (1st Cir. 1990).

We have been unable to find any case in which post-judgment interest was held to commence from the date of the original judgment, as here, when the trial court has itself vacated the original judgment, and the appellate court has, as here, *reversed* the judgment of the district court and modified the jury's findings.[8] When an appellate court reinstates a vacated judgment, as here, the rule is "that interest accrues from the date of the judgment on remand." De Long

[8] The cases typically arise by the granting of a judgment n.o.v. from which an appeal is taken. We thus have been unable to find any case linking the accrual of post-judgment interest to a judgment which has been vacated by both t he district court and a Court of Appeals.

Equipment v. Washington Mills Electro, 997 F.2d 1340, 1341 (11th Cir., 1993). Yet that Court held that when a jury verdict for the plaintiff is reinstated, equity commands that interest be awarded from the date of the original judgment. No state-mandated pre-judgment interest was available in that jurisdiction. Thus, appellate courts' rulings in this area appear to be predicated on what equity requires-*e.g.*, De Long and Dunn.

Equity is apparently sought by having post-judgment interest kick in at the earliest time so as not to penalize the plaintiff. But where state law provides for pre-judgment interest, the plaintiff is completely protected by having pre-judgment interest (here at 9%) and is hurt by such an early application of federal post-judgment interest (here 3.41%). The cases have developed, and are developing, rules in districts where there is apparently no provision for pre-judgment interest, or it is otherwise unavailable -- and these should not be automatically applicable to cases in jurisdictions where, as here, pre-judgment interest is available. Totally different equitable considerations come into play. We urge, as another reason for granting certiorari here, that this Court examine whether the rules being evolved for cases where there is no pre-judgment interest available should be applied, without further thought, to cases wherein pre-judgment interest is available.

Kaiser has produced no panacea. But in determining what is a meaningful decision in the context of no pre-judgment interest being available, the same standards cannot logically apply to cases where pre-judgment interest is available. There is now great danger that, as here, a standard developed to equitably protect a plaintiff will be applied to a

situation where it will protect a defendant, albeit inequitably.

To equitably protect a plaintiff from the running of post-judgment federal interest under the statute, who otherwise would have the protection of the more generous state rate of interest, further analysis should be had of the effect and use of the 52 week T-bill as the provider of the post-judgment interest rate. Such rates are notoriously lower than those of commercial bonds, both because of their 100 percent security and their tax advantages -- neither of which is helpful to a successful plaintiff who must, under 1961, take the discounted T-bill rate, and thus cannot be made whole.

The requirement of 1961 that the rate be that settled immediately prior to the date of the judgment presents yet further difficulties in making the plaintiff whole, as exemplified by this very case. By ruling that the "judgment" within the meaning of § 1961 was the 1992 judgment, Indu Craft was stuck with the 1992 applicable low rate of 3.41 percent rather than the 5.67 percent rate existent when the Court of Appeals modified and reinstated the 1992 judgment in 1995-and stuck with this lower rate for ever after. Indu Craft certainly was not made whole by this picayune rate of interest and certainly could not have borrowed money elsewhere at this rate.

Does it not follow that where the state law at issue provides for pre-judgment interest at a substantially higher rate than that prescribed by the federal law, the only equitable rule to make a plaintiff whole would be to allow pre-judgment interest until the last meaningful judgment? Post-judgment interest under section 1961 ought to apply after this date.

Such issues are worthy of full briefing and oral argument. This Court should examine this case so as to avoid a rule of equity being turned into an instrument of inequity.

IV. Since the Mandate of the Court of Appeals Governs the Allowance of Interest, it Was Unnecessary to Preserve the Point That Pre-Judgment Interest Should Have Been Compounded

Under New York law, a court may compound interest if it determines that the defendants acted in bad faith. As was ruled in Wilson v. Great American Industries, Inc., 763 F. Supp. 688, 691 (N.D.N.Y., 1991), after remand from the Second Circuit:

> Pursuant to the provision in New York Civil Practice Law and Rules § 5004 that "[i]nterest [upon judgments] shall be at the rate of nine per centum per annum . . . ," this court finds that this is the appropriate rate of interest in this case. Such interest may be compounded if the court determines that the defendants acted in bad faith. *See Matter of Revson,* 86 A.D. 2d 872, 447 N.Y.S. 2d 297, 302 (2d Dept. 1982) (citing *Brown v. Knapp,* 79 N.Y. 136, 145). Since the Second Circuit found that the defendants acted fraudulently with respect to the plaintiffs, this court, in its discretion holds that compound interest is appropriate under these circumstances.

Rule 37, Fed. R. App. P., requires the mandate of the appellate court to contain instructions with respect to allowance of interest when, as here, a judgment was modified or reversed with a direction that a judgment for money be entered in the district court. Hence, the failure to have

preserved this question at the district court level cannot derogate from the petitioner's right to call upon the Court of Appeals for compounding of interest. Such interest is clearly allowable under New York law, the jury having found that the defendants acted in bad faith.

V. The Court's Decision to Reject the Proffered Jury Charge on Punitive Damages on the Prima Facie Tort Claim Was in Conflict with Relevant Decisions of the 4th and 9th Circuits, New York Appellate Courts, and Relevant Decisions of this Court

Indu Craft sought jury instructions for punitive damages on the prima facie tort claim. Without explanation, the trial court refused to deliver any charge in this regard, and the Second Circuit approved this refusal implicitly. This decision was in conflict with (a) Curtis, 415 U.S. 189, and Browning-Ferris, 492 U.S. 257, which held that punitive damages was an issue for the jury; (b) Johnson, 974 F.2d 1408, and Benign, 879 F.2d 473, which held that failure to give a properly submitted charge to the jury warranted reversal; and (c) New York appellate decisions, e.g., Walker v. Sheldon, 10 N.Y. 2d 401, 404-5 (1961); Le Mistral, 61 A.D. 2d at 495, which permit punitive damages for prima facie tort. Hence, certiorari should be granted to resolve this conflict.

CONCLUSION

This court should grant certiorari, and amend the judgment to provide that the jury award of $3.25 million for Indu Craft be reinstated in full; that post judgment interest be awarded under New York law, or alternatively, from the entry of the 1996 judgment; and that pre-judgment compound interest run until that date. The matter should also be remanded to the district court for a trial on the issue of the amount of punitive damages.

Respectfully submitted,

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